

1 **WO**

2  
3  
4  
5  
6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
8

9 Glen R. Scotti, ) No. CV-09-1264-PHX-MHM  
10 Plaintiff, ) **ORDER**  
11 vs. )  
12 )  
13 City of Phoenix, et al., )  
14 Defendants. )  
15 \_\_\_\_\_ )

16 Currently before the Court is Defendants City of Phoenix, City of Phoenix Police  
17 Department, Mary Freund, Christina Gonzalez, Jack Harris, Sandra Renteria, and David  
18 Sampson's Motion to Dismiss (Dkt. #13), filed on September 9, 2009. Plaintiff filed a  
19 Response (Dkt. #16) on October 5, 2009, and Defendants filed a Reply (Dkt. #17) on  
20 October 13, 2009. The Court has considered the pleadings of the parties as well as the  
21 applicable law and now enters its ruling.

22 **I. LEGAL STANDARDS**

23 In considering a motion to dismiss, the factual allegations of the complaint are  
24 accepted as true, and all reasonable inferences are drawn in favor of the plaintiff. Rhodes v.  
25 Robinson, 408 F.3d 559, 563 n. 1 (9th Cir. 2005). A complaint must state a claim for relief  
26 that is plausible and that allows the court to draw the reasonable inference that the defendant  
27 is liable for the conduct alleged. Ashcroft v. Iqbal, \_\_ U.S. \_\_, \_\_, 129 S. Ct. 1937, 1949  
28 (2009).

## **II. BACKGROUND / THE ALLEGATIONS OF THE COMPLAINT**

On June 11, 2009, Plaintiff Glen Scotti filed a Complaint against the City of Phoenix, Phoenix Police Department, Chief of Police Jack Harris, Commander Sandra Renteria, Lieutenant Christina Gonzalez, Detective Mary Freund, and Detective David Sampson. (Dkt. #1, ¶¶ 2-8).

Plaintiff is a retired Adult Probation Officer and, during the time the events in this case allegedly occurred, he worked as a licensed private investigator. (Dkt. #1, ¶ 22). Sometime prior to May 29, 2007, Plaintiff was hired by Andrew Rehkow to perform private investigative work. (Dkt. #1, ¶ 18). Rehkow was involved in an ongoing divorce proceeding with his former wife, Kimberly Lewis. (Dkt. #1, ¶ 14). Throughout the divorce proceedings, Lewis made several accusations of alleged criminal activity by Rehkow. Id. These accusations led to an ongoing criminal investigation against Rehkow that began in March 2002 and continued for a number of years. Id. Throughout that time period, Defendant Freund remained the lead investigator for the Rehkow investigation. Id. During this time, Defendant Freund became personally and emotionally involved with Lewis. (Dkt. #1, ¶ 15). Ultimately, Defendant Freund believed that Plaintiff's involvement as an investigator was criminal and she accused Plaintiff of being an accessory to aggravated harassment of Lewis committed by Rehkow. (Dkt. #1, ¶ 20).

On May 29, 2007, several City of Phoenix police officers used a battering ram to execute a search warrant at Plaintiff's home. (Dkt. #1, ¶¶ 12-13). Plaintiff contends that the search warrant was procured through the use of false and fabricated evidence. (Dkt. #1, ¶ 13). On June 12, 2007, the Maricopa County Grand Jury handed down an indictment charging Plaintiff with one count of Stalking, a class 3 felony. (Dkt. #1, ¶ 21). To secure the grand jury indictment against Plaintiff, Defendant Sampson appeared and testified before the grand jury. (Dkt. #1, ¶ 24). Defendant Sampson testified consistent with the reports prepared and submitted by Defendant Freund. Id. During the course of the criminal proceedings it was determined that the summaries and statements included in the reports prepared by Defendant Freund were factually inaccurate and contained false and fraudulent

1 statements and evidence. (Dkt. #1, ¶ 25). Additionally, Defendant Freund's reports  
2 intentionally omitted exculpatory evidence. (Dkt. #1, ¶ 26).

3 In a Minute Entry dated August, 5, 2008, the trial court issued a ruling that, as a matter  
4 of fact and law, the facts as presented to the grand jury were false and were not sufficient to  
5 establish probable cause. (Dkt. #1, ¶ 28). The State did not seek to obtain a second  
6 indictment or other probable cause determination against Plaintiff. Id. On December 18,  
7 2008, the charges against Plaintiff were dismissed. (Dkt. #1, ¶ 29).

8 On June 11, 2009, Plaintiff filed the present Complaint, consisting of one federal  
9 claim against Defendants for malicious prosecution under 42 U.S.C. § 1983 (Count 1), and  
10 several state law claims for malicious prosecution (Count 2), gross negligence (Count 3),  
11 intentional infliction of emotional distress (Count 4), negligent infliction of emotional  
12 distress (Count 5), and defamation of character (Count 6). (Dkt. #1).

### 13 **III. DISCUSSION**

#### 14 **A. Malicious Prosecution Under 42 U.S.C. § 1983**

15 Plaintiff asserts a malicious prosecution claim against Defendants under 42 U.S.C. §  
16 1983. “[T]o prevail on a § 1983 claim of malicious prosecution, a plaintiff ‘must show that  
17 the defendants prosecuted [him] with malice and without probable cause, and that they did  
18 so for the purpose of denying [him] equal protection or another specific constitutional right.’”  
19 Awabdy v. City of Adelanto, 368 F.3d 1062, 1066 (9th Cir. 2004) (quoting Freeman v. City  
20 of Santa Ana, 68 F.3d 1180, 1189 (9th Cir. 1995)). “Malicious prosecution actions are not  
21 limited to suits against prosecutors but may be brought, as here, against other persons who  
22 have wrongfully caused the charges to be filed.” Id. at 1066.

23 To state a claim for malicious prosecution, Plaintiff must have alleged that a state or  
24 local official improperly exerted pressure, knowingly provided misinformation to the  
25 prosecutor, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith  
26 conduct that was actively instrumental in causing the initiation of legal proceedings. Lacy  
27 v. County of Maricopa, 631 F. Supp. 2d 1183, 1195 (D. Ariz. 2008). The filing of a criminal  
28 complaint immunizes police officers from damages suffered thereafter because it is presumed

1 that the prosecutor filing the complaint exercised independent judgment in determining that  
2 probable cause for an arrest exists at that time. Harper v. City of Los Angeles, 533 F.3d  
3 1010, 1027 (9th Cir. 2008). “A § 1983 plaintiff may rebut this presumption, however, by  
4 showing that the [prosecutor] was pressured or caused by the investigating officers to act  
5 contrary to his independent judgment.” Id. at 1028. The presumption of prosecutorial  
6 independence does not protect investigative officers if they interfered with the prosecutor's  
7 judgment by making false reports or omitting relevant information. Id.

8 In the present case, Plaintiff alleges that “[t]he Defendants, individually and  
9 collectively, contributed to the presentation of false and fraudulent evidence and testimony  
10 to the Maricopa County Grand Jury.” (Dkt. #1, ¶ 33). Specifically, according to Plaintiff,  
11 “Defendant Freund’s reports intentionally omitted exculpatory evidence,” “Defendant  
12 Freund’s supervisors were aware of her actions and helped perpetuate the introduction of  
13 false evidence and the malicious prosecution of Plaintiff,” and “the summaries and  
14 statements included in the reports prepared by Defendant Freund were factually inaccurate  
15 and contained false and fraudulent statements and evidence.” (Dkt. #1, ¶¶ 25-27). It is  
16 possible to infer from these allegations that the grand jury's ultimate decision to indict  
17 Plaintiff was tainted by the false information presented by Defendants and that Defendants  
18 acted with malice and with the intent to deprive Plaintiff of his Constitutional rights.

19 In their Reply, Defendants argue that a two-year statute of limitations forecloses  
20 Plaintiff’s § 1983 claims, based on Plaintiff’s alleged need to amend his Complaint to  
21 articulate causes of action under the First and Fourth Amendments. The Court need not  
22 consider Defendants’ position since it was first raised in their reply brief. Eberle v. City of  
23 Anaheim, 901 F.2d 814, 818 (9th. Cir. 1990) (noting that legal arguments raised for the first  
24 time in the reply brief are deemed waived). Thus, even if the argument Defendants made had  
25 merit, which it lacks, the Court could not appropriately consider it, since Plaintiff did not  
26 have the opportunity to respond. See United States v. Romm, 455 F.3d 990, 997 (9th. Cir.  
27 2006); Smith v. Marsh, 194 F.3d 1045, 1052 (9th. Cir. 1999).

28 On the basis of the allegations in his complaint, Plaintiff may be able to prove that

1 Defendants' false and fraudulent testimony to the grand jury and other similarly  
2 conspiratorial conduct were instrumental in causing the filing and prosecution of the criminal  
3 proceedings. Plaintiff has therefore stated a claim for malicious prosecution under § 1983.

4 **B. Notice of Claim**

5 Arizona Revised Statutes (“A.R.S.”) § 12-821.01(A) provides that “[p]ersons who  
6 have claims against a public entity or public employee shall file claims . . . within one  
7 hundred eighty days after the cause of action accrues.” The statute mandates that “[a]ny  
8 claim which is not filed within one hundred eighty days after the cause of action accrues is  
9 barred and no action may be maintained thereon.” Id. “Compliance with the notice  
10 provision of § 12-821.01(A) is a mandatory and essential prerequisite to such an action.  
11 Failure to comply with the statute is not cured by actual notice or substantial compliance.  
12 Rather, plaintiff’s failure bars any claim against the entity or employee.” Harris v. Cochise  
13 Health Sys., 215 Ariz. 344, 351, 160 P.3d 223, 230 (Ariz. Ct. App. 2007) (internal citations  
14 omitted). “[A] cause of action accrues when the damaged party realizes he or she has been  
15 damaged and knows or reasonably should know the cause, source, act, event, instrumentality  
16 or condition which caused or contributed to the damage.” Mayer Unified Sch. Dist. v.  
17 Winkleman, 219 Ariz. 562, 566, 201 P.3d 523, 527 (2009) (citation omitted); A.R.S. §  
18 12-821.01(B).

19 Plaintiff claims that his cause of action accrued on August 8, 2008, when he  
20 discovered, through an electronically filed Minute Entry in the Maricopa County Superior  
21 Court, that evidence presented by Defendants to the grand jury was false. In the Minute  
22 Entry, the Superior Court commented that “[t]he admitted false information presented [was]  
23 more than sufficient to call into question how the grand jurors viewed the evidence  
24 presented” and that the information presented to the jury “was not correct and severely  
25 undermine[d] the fairness of the proceedings.” State v. Scotti, CR2007-134343-001 DT  
26 (Maricopa County Super. Ct. Aug. 5, 2008). The Superior Court ultimately held that “the  
27 admitted errors in [the] case were not harmless.” Id. Is it highly probable that without this  
28 entry by the Superior Court, Plaintiff may have never discovered the fraudulent evidence that

1 was presented by Defendants.

2 Plaintiff served his original Notice of Claim on Defendants City of Phoenix and  
3 Renteria on August 14, 2008. He served his Amended Notice of Claim on Defendants  
4 Phoenix Police Department, Freund, Gonzalez, Harris, and Sampson on February 6, 2009.  
5 According to the Court's calculations, Plaintiff's original Notice of Claim was served six  
6 days after his cause of action accrued and his Amended Notice of Claim was served 182 days  
7 after his Cause of Action accrued.<sup>1</sup> Accordingly, Plaintiff's state claims against Defendants  
8 Phoenix Police Department, Freund, Gonzalez, Harris, and Sampson must be dismissed.

9 **C. Statute of Limitations**

10 Arizona Revised Statutes § 12-821 provides that "[a]ll actions against any public  
11 entity or public employee shall be brought within one year after the cause of action accrues  
12 and not afterward." "[A] cause of action accrues when the damaged party realizes he or she  
13 has been damaged and knows or reasonably should know the cause, source, act, event,  
14 instrumentality or condition which caused or contributed to the damage." Mayer Unified Sch.  
15 Dist., 219 Ariz. at 566, 201 P.3d at 527. As mentioned in Section B, *supra*, Plaintiff  
16 contends that his cause of action accrued on August 8, 2008. Plaintiff filed his Complaint  
17 in this Court on June 24, 2009. Because this action was filed within one year after Plaintiff's  
18 cause of action accrued, the statute of limitations has not run and the state claims against the  
19 remaining two Defendants are not time-barred.

20  
21 **D. State Law Claims for Malicious Prosecution, Intentional Infliction of**  
22 **Emotional Distress, Negligent Infliction of Emotional Distress and**  
**Defamation.**

23 Defendants assert that the state law claims for malicious prosecution, intentional  
24 infliction of emotional distress, negligent infliction of emotional distress, and defamation  
25 should be dismissed. Plaintiff agrees. Therefore, the Court will dismiss the state law claims

---

26  
27 <sup>1</sup>According to the Court's calculations, there were 23 days remaining in August after  
28 the 8th, 30 days in September, 31 days in October, 30 days in November, 31 days in  
December, 31 days in January, and six days in February for a total of 182 days.

1 for malicious prosecution, intentional infliction of emotional distress, negligent infliction of  
2 emotional distress, and defamation.

### 3 **E. Gross Negligence**

4 A party is grossly negligent if “he acts or fails to act when he knows or has reason to  
5 know facts which would lead a reasonable person to realize that his conduct not only creates  
6 an unreasonable risk of bodily harm to others but also involves a high probability that  
7 substantial harm will result.” Walls v. Ariz. Dep’t Pub. Safety, 170 Ariz. 591, 595, 826 P.2d  
8 1217, 1221 (Ariz. Ct. App. 1991). “Ordinarily, the issue of gross negligence is a question  
9 of fact to be decided by the jury.” Id. (citing Southern Pac. Transp. Co. v. Lueck, 111 Ariz.  
10 560, 563, 535 P.2d 599, 602 (1975), cert. denied, 425 U.S. 913 (1976)). “In order to present  
11 such an issue to the jury, gross negligence need not be established conclusively, but the  
12 evidence on the issue must be more than slight and may not border on conjecture.” Id. (citing  
13 DeElena v. Southern Pac. Co., 121 Ariz. 563, 569, 592 P.2d 759, 765 (1979)). “A court may  
14 withdraw the issue of gross negligence from the jury only when no evidence is introduced  
15 that would lead a reasonable person to find gross negligence.” Id. Additionally, “a wanton  
16 or grossly negligent servant may subject his master to punitive damages.” Echols v. Beauty  
17 Built Homes, Inc., 132 Ariz. 498, 502, 647 P.2d 629, 633 (1982).

18 Here, Plaintiff contends that Defendants’ “conduct deviated from the duty and  
19 standard of care required of police officers by relying on false or fraudulent information to  
20 secure a grand jury indictment against [Plaintiff] and the subsequent use of that information  
21 as a basis for criminal prosecution of [Plaintiff].” (Dkt. #1, ¶ 48). Indeed, a review of the  
22 Superior Court’s Minute Entry shows that “the evidence presented to the grand jury was  
23 false.” Scotti, CR2007-134343-001 DT at p. 2 (Maricopa County Super. Ct. Aug. 8, 2008).  
24 Because the Court must draw all reasonable inferences in favor of Plaintiff, and since the  
25 evidence on this issue is “more than slight,” a reasonable person might be able to find gross  
26 negligence. Accordingly, the gross negligence claim against Defendants City of Phoenix and  
27 Renteria will not be dismissed.

### 28 **F. City of Phoenix Police Department**

1 Defendants contend that because the Phoenix Police Department is a non-jural entity,  
2 this Court is without jurisdiction. (Dkt. # 13, p. 15). Plaintiff agrees. (Dkt. #16, p. 8). As  
3 this court has indicated previously, the Arizona state courts have not yet addressed the issue  
4 of whether police departments, sheriff's offices, and entities with similar legal identities are  
5 non-jural under Arizona state law, and decisions issued by courts within the District of  
6 Arizona have been conflicting. See Auble v. Maricopa County, 2009 U.S. Dist. LEXIS  
7 110457 (D. Ariz. Oct. 14, 2009); Payne v. Arpaio, 2009 U.S. Dist. LEXIS 110553, \*12-16  
8 (D. Ariz. Nov. 4, 2009). In this case, Defendants suggest that the City of Phoenix is the  
9 appropriate Defendant since the Phoenix Police Department is merely a subpart of the City  
10 of Phoenix. (Dkt.#13, p. 15). Because the City of Phoenix is already a named Defendant,  
11 without offering an opinion as to whether the Phoenix Police Department is a non-jural  
12 entity, the Court will dismiss the Phoenix Police Department, as its presence is superfluous.

13 **Accordingly,**

14 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (Dkt. #13) is  
15 **GRANTED IN PART** and **DENIED IN PART**.

16 **IT IS FURTHER ORDERED** that Plaintiff's state law claims for malicious  
17 prosecution, intentional infliction of emotional distress, negligent infliction of emotional  
18 distress, and defamation are **DISMISSED WITH PREJUDICE**.

19 **IT IS FURTHER ORDERED** that Plaintiff's state law claim for gross negligence  
20 against Defendants Phoenix Police Department, Freund, Gonzalez, Harris, and Sampson is  
21 **DISMISSED WITH PREJUDICE**.

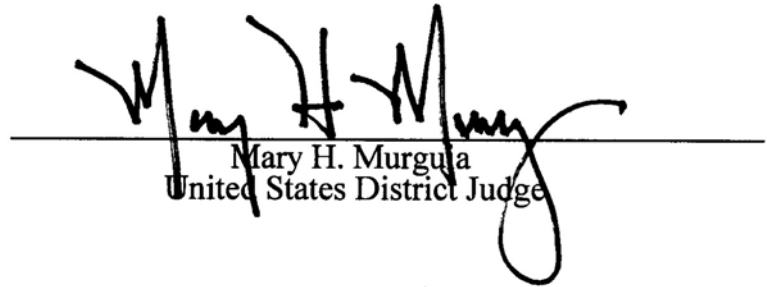
22 **IT IS FURTHER ORDERED** that Plaintiff's claims against Defendant Phoenix  
23 Police Department are **DISMISSED WITH PREJUDICE**.

24 **///**



1           **IT IS FURTHER ORDERED** that Plaintiff's claims for (1) Malicious Prosecution  
2 under 28 U.S.C. 1983 against Defendants City of Phoenix, Mary Freund, Christina Gonzalez,  
3 Jack Harris, Sandra Renteria, and David Sampson; and (2) Gross Negligence under state law  
4 against Defendants City of Phoenix and Renteria may proceed.

5           DATED this 16<sup>th</sup> day of March, 2010.

6  
7  
8             
9           Mary H. Murgula  
10           United States District Judge